Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

October Term, 1994

JULES WERTHEIMER,

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Where federal agents, conducting a sting operation, made payments to an employee of the Small Business Administration's Office of Advocacy, for his recommendation of other agencies and officials to assist them in marketing an alleged textile product to the government, and to assist them in structuring their organization and securing a grant, none of which activities were within his official powers, did these payments constitute payments "for or because of any official act" within the meaning of 18 U.S.C. §201(C)(1)(b)?

2. Did the admission of evidence of alleged prior uncharged crimes, which was admitted without any proof the alleged crimes actually occurred, or only through hearsay evidence of such crimes, violate the decisions of this Court and other Circuits interpreting Federal Rule of Evidence 404(b)?

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Jules Wertheimer, your Petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on August 10, 1994.

OPINIONS BELOW

On August 10, 1994 a panel of the United States Court of Appeals for the Third Circuit, consisting of Judges Mansmann, Cowen and McKee, entered a 12 page Memorandum Opinion, authored by Judge Mansmann, which has not been officially reported,[1] but is reproduced in Appendix A, infra, pp. A1-A10. This Order and Opinion affirmed the Judgment of Conviction and Sentence entered by Honorable Robert S. Gawthrop, III, United States District Judge for the Eastern District of Pennsylvania, on February 28, 1994. That Judgment is reproduced in Appendix B, infra, p. A11-A17.

On September 7, 1993 Judge Gawthrop had entered an Order granting Government's motion to admit evidence, which Order is not officially reported, but which is reproduced in Appendix C, infra, pp. A18 to A19. On November 8, 1993 Judge Gawthrop had entered an Order denying Defendant's Motion for Judgment of Acquittal, which is also not officially reported, but which is reproduced in Appendix D, infra, Appendix A20-A21.

JURISDICTION

The Order of the United States Court of Appeals for the Third Circuit (App. A, infra, pp. A1-A10), affirming the Order of the District Court, was entered on August 10, 1994. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

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[1]. The Opinion is noted "Not for publication."

CONSTITUTIONAL PROVISION, STATUTE, CODE OF FEDERAL REGULATION, AND FEDERAL RULES OF EVIDENCE INVOLVED

The United States Constitution provides in pertinent part:

Amendment V:

No person shall****be deprived of life, liberty, or property, without due process of law . . . .

The Federal Bribery Statute provides in pertinent part:

18 U.S. Code

§201. Bribery of public officials and witnesses

(a) For the purpose of this section-

* * *

(3) the term "official acts" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

* * *

(c) Whoever-

(1) otherwise than as provided by law for the proper discharge of official duty-

* * *

(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks,

> receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;
>
> * * *
>
> shall be fined under this title or imprisoned for not more than two years, or both.

The Code of Federal Regulations provides in pertinent part:

13 C.F.R.

§101.2-6 Office of Advocacy.

> Under the direction of the Administrator, directs the planning and development of government-wide public policies and administrative vehicles which enforce a nationwide program of Advocacy of small businesses; serves as chief spokesperson of such program; and otherwise carries out the mandate of Pub.L. 94-305. Responsible for ensuring that major government-wide policy directions enhance the economic viability of the largest possible number of small businesses. Ensures that the end results of such policies and administrative procedures, in furtherance of the statutory requirements include, but are not limited to, the following:
>
> > (a) Expanding small business in such a way as to enhance employment opportunities; (b) Working toward improving the tax structure in order to improve the viability and growth of small business; (c) Addressing all major Federal functions impinging on small business with the proper guidance, direction and instruction to assure a uniformity of purpose and approach which benefits small business and promotes or stimulates compe-

tition; and (d) Developing and recommending approaches to the ways and means of educating and training existing and potential small business persons, and developing incentives for entrepreneurship which assure equality of access to such entrepreneurs. . . . .

* * *

§129.2 Counseling.

Individualized management and technical assistance is provided to small business-persons, and those who are considering starting a business, through the various resources of the management assistance counseling programs at no charge. Management assistance counseling programs are based primarily on private sector resources, as follows:

(a) SCORE and ACE. . . .

(b) Small Business Institute. . . .

(c) Professional consulting services . . . .

Services provided under this program may include accounting services, production, engineering and technical advice, feasibility studies, marketing analyses, etc.

The Federal Rules of Evidence provide in pertinent part:

Rule 404(b)

Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan,

knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

STATEMENT OF THE CASE

This Petition seeks review of the Order of the Court of Appeals for the Third Circuit affirming the Judgment of Conviction and Sentence of the District Court for the Eastern District of Pennsylvania.

On March 9, 1993, Petitioner was indicted by a federal grand jury in the Eastern District of Pennsylvania for: three counts of aiding and abetting the receipt of a thing of value by a public official for and because of acts performed by that public official, in violation of 18 U.S.C. §201(c)(1)(b) and §2; one count of conspiracy to unlawfully select and accept the payment of illegal gratuities, in violation of 18 U.S.C. §371, and to engage in a scheme to defraud the United States of the honest services of an S.B.A. official named Gerald Lawson (now deceased), who was named as an unindicted co-conspirator; and two counts of devising a scheme to defraud the United States through interstate wire communications, in violation of 18 U.S.C. §1343. On September 20, 1993, he was convicted of all charges except one of the wire fraud counts, and on February 28, 1994 he was sentenced to imprisonment for 13 months, followed by supervised release for 36 months, and fined $15,000.00, with assessments of $250.00. The trial Judge continued bail pending appeal. On August 10, 1994, a panel of the Third Circuit Court of Appeals, consisting of Judges Mansmann, Cowen and McKee, affirmed the conviction and sentence, filing a 12 page Memorandum Opinion authored by Judge Mansmann. A Motion for Stay of Mandate until November 8, 1994 was granted on September 12, 1994.

The charges arose out of an undercover "sting operation" launched by the F.B.I. to identify corrupt federal officials, government contractors and consultants involved in procurement. Petitioner, Jules Wertheimer, had been a consultant for many years, but was targeted by a Department of Defense contractor, Wallace

Forman, who had himself pled guilty to charges of conspiracy and paying gratuities arising out of his dealing with other government officials that had nothing to do with Petitioner Jules Wertheimer. Forman agreed to cooperate with the federal government as part of a pre-indictment plea agreement, and made accusations against Wertheimer.

As part of the sting operation, the Government set up an undercover consulting firm, named Northeast Investors, Inc. which ostensibly was interested in marketing a textile product to the federal government. In December, 1988, in Forman's office in Long Island, Forman introduced Wertheimer to several F.B.I. agents posing as representatives of Northeast Investors. Two agents then met with Wertheimer in New York to discuss hiring him as a consultant to aid them in obtaining Government contracts. According to one of the F.B.I. agents, initially Wertheimer described his contacts with Government officials and claimed he had connections in Congress and clout in the Pentagon. In May, 1989, the agents hired Wertheimer for a retainer of $5,000.00 and a fee of $1,250.00 per week for 26 weeks. In return, Wertheimer introduced them to various Government officials including Gerald Lawson, an official of the S.B.A. in Washington, D.C., whom Wertheimer had known for a long time.

On May 30, 1989, one of the agents met with Lawson and Wertheimer in Washington, D.C., and thereafter Wertheimer, Forman, the agent and Lawson met and spoke on the phone on numerous occasions. Many of the conversations were recorded. (There were 581 consensual recordings made during the period of October, 1988 to October, 1991, and 104 court-authorized wiretaps on Lawson's home and office phones.)

Lawson recommended areas in Government procurement agencies they should go to during the summer of 1989. Lawson introduced one of the agents to Paul Pumpian, who worked with Lawson at the S.B.A., and who was about to be appointed to the Consumer Protection Safety Commission. One of the agents tes-

tified that in October 18, he paid Lawson $5,000.00. In January, 1990, one of the agents testified that he met with Wertheimer and suggested that he take a cut in salary saying that although Wertheimer had introduced them to Lawson, he did not feel they were getting far in trying to meet other Government officials. That agent met with Lawson in D.C. on February 16, 1990 to discuss the agreements Lawson had with the other agent. Lawson responded that there were no arrangements, it was the agent's idea to pay him. On February 21, 1990, two agents met with Lawson and Pumpian in D.C. and one testified that he paid Lawson another $5,000.00. He also testified that two days later, one of the agents spoke to Wertheimer, who said Lawson was happy.

Wertheimer's employment by the F.B.I. was terminated at the end of June, 1990, although they had sent him his last check in June, 1990, which had not been accepted by Wertheimer. On July 9, Wertheimer told the agent that he had no interest in continuing his work for them. On July 5, the agent had met with Lawson in D.C. and had given him another payment of $5,000.00. He also testified that at that time, he also gave Pumpian $5,000.00. It should be noted that Wertheimer was not present at the time of any of these payments and there was no evidence or suggestion that he shared any of the funds.

Besides the three undercover F.B.I. agents, informant Forman testified. He testified that he had met Jules Wertheimer in 1978 and had retained him as a consultant to help his company retain its status as a small business. In 1981 Jules Wertheimer introduced him to Gerald Lawson, who gave Forman advice and information about "size appeal." Forman testified that he was led to believe that there was some monetary reward expected by Lawson. He testified to many hearsay statements and alleged admissions by Wertheimer purportedly in support of prior criminal acts.

In addition, the only witness who identified Lawson's func-

tions at the S.B.A. was Doris Freedman, Acting Chief Counsel for Advocacy in the S.B.A.

The testimony took three and one-half days and the jury then deliberated over a four day period, asking five questions, before convicting Jules Wertheimer on all counts but one wire fraud charge. Timely post-verdict motions were filed and denied, Defendant was sentenced, and a timely appeal was filed.

REASONS FOR GRANTING THE WRIT

I. Payments To An Employee Of The S.B.A.'s Office Of Advocacy, In Return For His Recommendations Of Other Agencies And Officials To Assist The Payers In Marketing An Alleged Textile Product To The Government, none of which activities more within his official powers, Did Not Fall Within The Decisions Of This Court And Other Courts of Appeals.

The indictment charged that Defendant Jules Wertheimer introduced undercover agents posing as investors to Gerald Lawson, an employee of the S.B.A. (now deceased), as an individual who could provide assistance, guidance, advice and information to investors in marketing their product to federal agencies and departments. It charged that Lawson discussed with investors how to market their product and get Government aid, introduced them to private consultants, gave them names of individuals to contact at various federal agencies, gave advice and information about procurement procedures and similar assistance. He accepted three payments of $5,000.00 each from the agents in return for his advice and assistance.

The pertinent portions of the statute, 18 U.S.C. §201(c)(1)(b), which is set forth at page 3 , supra, provides that whoever, being a public official, otherwise then as provided by law for the proper discharge of official duty, directly or indirectly accepts any thing of value personally for or because of any official act performed or to be performed by such official, shall be fined or imprisoned.

There is no dispute that Lawson was a public official at the time of the payments. However, the question in the case at bar is whether the gratuities received by Lawson were received for and because of "official acts" performed by him.

Lawson's duties were described by Doris Freedman, who

was Lawson's direct superior during the relevant time period, as including the functions of counseling small businesses with respect to their resolving problems with federal agencies and departments. She admitted that Lawson was one of at least a dozen or more senior GS-14s in that office, and had no authority to commit the Office of Advocacy of the S.B.A. to any thing of an official nature, and could not bind his office or any other federal agency in any manner. As a middle-level employee of the S.B.A., an assistant advocate in the Office of Advocacy, whose function was to counsel small business with respect to resolving problems with federal agencies and departments, the evidence showed that he went far beyond those parameters in using his influence on behalf of the FBI agents. He had no power to make any decisions or to take any action on any matter pending before him or which by law might be brought before him.

Under 13 CFR §101.2-6 (set out at p. 4 supra), the functions of the Office of Advocacy are spelled out. In summary, this Office is responsible for carrying out Government-wide policy discussions enhancing the economic viability of the largest possible number of small businesses, and to guide, educate and train existing and potential small business persons. The duties of counseling individuals in the private sector are performed by an entirely different section of the Agency — as spelled out in by 13 C.F.R. 129.2 (set forth at p. 5 supra), through management assistance counseling programs based primarily on private sector resources, such as SCORE and ACE, Small Business Institute, and Professional Consulting Services. Accordingly, Mr. Lawson had no right, power or authority to perform the functions for which he was allegedly paid.

There are a legion of cases interpreting §201(c)(1)(b), but most of them deal with the question of defining a public official within the meaning of the act. See, e.g., Dixson v. United States, 465 U.S. 482 (1984) (concluding that officers of a private nonprofit corporation administering and expanding federal commu-

nity development block grants were "public officials" subject to prosecution under 18 U.S.C. §201(a)); United States v. Del Toro, 513 F.2d 656 (2nd Cir. 1975) (concluding that a Model Cities program official was an employee of the City and not a federal public official under 18 U.S.C. §201(b)); United States v. Loschiavo, 531 F.2d 659 (2nd Cir. 1976) (concluding that Deputy Director and Acting Director of the Harlem - East Harlem Office of the New York Model Cities Administration were not federal public officials within the meaning of 18 U.S.C. §201(a), relying on Del Toro, supra); United States v. Levine, 129 F.2d 745 (2nd Cir. 1942) (holding that an employee of Market Administrator for New York Metropolitan Milk Marketing Area was a person in an official position acting on behalf of the United States under 18 U.S.C. §207, a prior version of §201); Thomson v. United States, 37 App.D.C. 461 (1911) (concluding that a postal card agent, appointed by the President to report directly to the Postmaster General, is an official within the meaning of the bribery statute, a predecessor of 18 U.S.C. §201).

However, few of the reported cases deal with the question of what is an official act within the meaning of this statute, and those few reach almost irreconcilable conclusions.

The seminal case dealing with this issue was this Court's decision in United States v. Birdsall, 233 U.S. 223 (1914). That case involved an attorney's attempt to pay bribes to special officers who had been appointed by the Commissioner of Indian Affairs for the suppression of liquor traffic among the Indians. The attorney sought to influence their official acts by getting them to advise the Commissioner of Indian Affairs, that leniency should be granted to his clients who had been sentenced for unlawfully selling liquor to Indians, and that the Commissioner should so recommend to the Judge, the United States Attorney, the Secretary of the Interior, the Attorney General or the President. This Court, in discussing whether the acts charged fell within the condemnation of the statute (a predecessor of §201(b)), concluded

that to constitute official action it was not necessary that it should be prescribed by statute; it was sufficient that it be governed by a lawful requirement of the department under whose authority the officer was acting. That requirement need not be prescribed by a written rule or regulation, but might also be found in an established usage constituting the common law of the Department and fixing the duties of those engaged in its activities. However, it must be noted that the bribery statute then in effect prohibited the acceptance of money by an officer acting for or on behalf of the United States, in any official capacity, who accepted with intent to have his decision or action on any matter brought before him in his official capacity, influenced thereby. The section prohibiting bribe-giving used similar language, but added the words "with intent to influence him to commit . . . any fraud . . . on the United States, or to induce him to do or omit to do any act in violation of his lawful duty." Thus, the word "action" was not preceeded by the qualifying term "official" as it is in the present statute. This Court interpreted the statute to require that the term be qualified to encompass official duties.

Since that Opinion, there have been many cases interpreting the term "official act." These decisions are inconsistent with each other, so that there appears to be a split in the Circuits as to their interpretation. Decisions in the Second, Fourth, Sixth and District of Columbia Circuits, as well as in the District Courts in Illinois (7th Circuit), and Washington (Ninth Circuit) conclude that conduct of public employees do not constitute an official act. For example, see:

SECOND CIRCUIT:

United States v. Myers, 692 F.2d 823 (2nd Cir. 1982) (a Congressman could not be convicted of violation of statute prohibiting members of Congress from receiving compensation for services rendered in relation to any proceeding in which the United States is interested merely by accepting money for giving advice

about immigration);

FOURTH CIRCUIT:

Woelfel v. United States, 237 F.2d 484 (4th Cir. 1956) (post engineer, who could not authorize a change in contract specifications and had nothing to do with agreements between the Corps of Engineers and the general contractors or sub-contractors, but was required to advise with the Ordnance officer concerning needed changes, sought a gratuity to effect a change. He was entitled to a jury instruction that if the request for gratuity was not made until he had exhausted his power of decision or action on the matter before him, it was not a violation of the statute);

SIXTH CIRCUIT:

Blunden v. United States, 169 F.2d 991 (6th Cir. 1948) (a civilian employee of the United States Army in charge of Stock Control Division of an Ordnance Depot, who had no legal authority to ship out mission property to anyone with no connection with the War Department, received money for designating mission property as surplus property. This was held not to be prohibited by §201, since he had no authority to give or even recommend the priority or advantage which the donors sought);

D.C. CIRCUIT:

United States v. Muntain, 610 F.2d 964 (D.C. Cir. 1979) (assistant to the Secretary for Labor Relations for the United States Department of Housing and Urban Development was paid for assisting insurance brokers and marketing group to sell auto insurance to labor unions. This was held not to be criminal within §201(g) since there was no evidence that the subject matter could be brought before anyone at HUD in an official capacity);

N.D. ILLINOIS (SEVENTH CIRCUIT):

United States v. Gibson, 47 Fed. 833 (N.D. Ill. 1891) (an I.R.S. agent was offered money to set fire to a distillery, which he was entitled to enter for the purpose of checking that proper revenue stamps were affixed to receptacles containing alcoholic spirits; the action was entirely outside the official function of the officer);

N.D WASHINGTON (NINTH CIRCUIT):

In Re Yee Gee, 83 Fed. 145 (N.D. Wash. 1897) (a Chinese interpreter, appointed by the Secretary of Treasury, was not acting within the scope of his official duty while serving as an interpreter at a hearing of criminal charges before a United States Commissioner, since he was not appointed by the Secretary of Treasury to act as an interpreter in any judicial proceeding).

In the following cases, the Courts in the Second, Third, Fifth, Sixth, Seventh and Ninth Circuits have found that the conduct of various officials have been considered official action within the meaning of the statute.

SECOND CIRCUIT:

United States v. Irwin, 354 F.2d 192 (2nd Cir. 1965) (an employee of the I.R.S. was paid for preparing a favorable audit report);

United States v. Jacobs, 431 F.2d 754 (2nd Cir. 1970) (an I.R.S. agent was paid to influence an investigation of comedian Alan King's tax returns);

United States v. Carson, 464 F.2d 424 (2nd Cir. 1972) (an administrative assistant to United States Senator Hiram Fong received money and the promise of more money in order to "fix" an indictment arising out of an S.E.C. investigation);

United States v. Biaggi, 853 F.2d 85 (2nd Cir. 1988) (a Congressman received gifts for writing letters on Congressional stationary to urge federal and state officials to take

favorable action on behalf of the payers, and this was held to be a "official act" within §201;

THIRD CIRCUIT:

United States v. Neiderberger, 550 F.2d 83 (3rd Cir. 1978) (an I.R.S. agent was given junkets and other things of value to give a favorable audit of Gulf Oil Company);

United States v. Standefer, 452 F.Supp. 78 (W.D. Pa. 1978) (officers of Gulf Oil were found guilty of offering a bribe to the I.R.S. agent involved in the Neiderberger case);

United States v. Heffler, 402 F.2d 924 (3rd Cir. 1968) (contractor offered bribe to senior technician who made technical evaluations which influenced the allowance of contract variances on Army Aviation Materiel Command contracts, even though the employee did not have authority to make the final decision, since his advice and recommendation would be influential);

FIFTH CIRCUIT:

United States v. Dobson, 609 F.2d 840 (5th Cir. 1980) (an auditor for the Department of Energy was paid to prepare a favorable report, even though he did not prepare his memo until after the end of his official employment);

United States v. Evans, 572 F.2d 455 (5th Cir. 1978) (President of collection agency paid a bank officer who became an employee of H.E.W. to refer collection of student loans to his company even though his position was ministerial or subordinate or that he actually lacked the authority to perform an act to benefit the donor);

SIXTH CIRCUIT:

United States v. Gjieli, 717 F.2d 968 (6th Cir. 1983) (a payment by a bartender to an A.T.F. agent to try to get someone out of state prison was held to violate §201. There was a vigorous dissent by Judge Lively);

SEVENTH CIRCUIT:

United States v. Arroyo, 581 F.2d 649 (7th Cir. 1978) (a loan officer at the S.B.A. approved a guaranteed loan was covered by §201) (Judge Swygert dissented);

NINTH CIRCUIT:

United States v. Alessio, 528 F.2d 1079 (9th Cir. 1976) (defendant paid the camp administrator at Lompoc Prison Camp, a minimum security institution for federal prisoners, to secure benefits for his friends who were federal prisoners).

Some of the above cases suggest that payments to public officials are unlawful without a quid pro quo, and even though the public official does not actually have power to perform the act that he promises in return for money. On the other hand, these cases point out that an official must have duties with respect to the conduct sought and must be acting within the sphere of official conduct. Even in Birdsall, supra, the Court noted the requirement that an official must be acting within the sphere of official conduct, before the giving of and acceptance of bribes to influence their reports and recommendations would fall within the statute. And in Thomson, supra, the Court noted that:

> "Under the Government's contention, if a person not connected with the Government serves in any way had assumed to inspect such paper or any consignment thereof, and the defendant, under the mistaken belief that such person really is a government agent or employee, have offered him a bribe, the offense of bribery would have been complete. Such cannot be the law. Before there can be an official function, there must be some duty, some responsibility."
>
> 37 App. D.C., at 467.

It should be noted that in the case at bar, Lawson was not carrying out his official functions when he introduced or offered to introduce undercover agents to other Government officials, and made suggestions as to how they should proceed. He had no

legal authority, by law, regulation, or custom, to influence the conduct of those other Government employees. He had no right, power or authority to perform the functions for which he was allegedly paid. In fact, he acted in a manner completely at odds with his so called official duty. Specifically, he met with the agents in hotel rooms and restaurants, and never in his office, and introduced them to other private consultants, such as Henry Ramirez, who were to introduce them to contacts in Government. In conversations with him, Lawson told the undercover agents that he could make introductions and appointments for them, could shepherd them through the Government procurement process, could go to Congressional committees and talk to members of Congress and their staff regarding the undercover business, and could introduce them to agency officials who could authorize purchases of their products. None of these actions were within his job description as contained either in the testimony of Doris Freedman or the Code of Federal Regulations previously cited. In fact, if those functions came under the umbrella of the SBA, it was under a different section of the Agency. His conduct was no more "official action" than the conduct in Blunden v. United States, supra, p. 15.

The District Judge here, in denying the Motion for Judgment of Acquittal, stated:

> "If I were to accept Defendant's definition of what constitutes an official act, then virtually nothing that Mr. Lawson, or for that matter, any middle-level government employee does not have decision-making power, could be characterisable as an official act, and middle level government employees could accept bribes with mere impunity."
>
> (p.A20 infra).

This misinterprets what Defendant suggests. Defendant suggests only that the statute does not go so far as to reach the type of conduct involved here. That does not mean that the conduct cannot be punished under other appropriate sections of the

law. The District Judge's interpretation would mean that a public official who sets up a private Ponzi scheme, defrauds a friend, or attempts to commit a private fraud, such as selling a piece of property he does not own, could be prosecuted under §201. Obviously, such conduct may be reprehensible, but it is not criminal within the strictures of §201. See United States v. Muntain, supra, 610 F.2d at 968.

Some statutes on bribery have been in existence since the mid-19th century. The Section as presently drafted, most recently amended in 1962, has undergone only minor changes in more than a century. Nonetheless, the cases interpreting this conduct are conflicting and muddled. It is thus vital for this Court to clarify the definition of the conduct which is punished under the statute, since to permit the interpretation of the District and Circuit Courts here would render the statute unconstitutionally void for vagueness and would violate the Fifth Amendment.

II. The Admission Of Evidence Of Alleged Prior Uncharged Crimes, Without Proof That Such Crimes Occurred, Or Only Through Hearsay Evidence Of Such Crimes, Violated The Decisions Of This Court And Other Circuits Interpreting Federal Rule of Evidence 404(b).

Prior to the commencement of trial, the Government filed a Motion and Memorandum of Law to admit evidence of similar acts. The defense filed a Motion in Limine and Memorandum of Law objecting to such evidence. On September 7, 1993, the Judge entered an Order granting the Government's Motion, and making findings of fact (App. C, infra, pp. A18).

The trial was replete with statements and references to other offenses, not merely limited to payments by Wertheimer to Gerald Lawson and another SBA official of illegal gratuities on behalf of Wallace Forman, as proferred in the Government's Motion. For example, undercover Agent Mooney testified about a statement allegedly made by Wertheimer about paying off Congressman Biaggi. Although this reference was stricken, Biaggi's name came up on a number of additional occasions,[1] and striking this evidence is equivalent to instructing the jury to ignore a pink elephant standing in the corner of the room. Furthermore, there were numerous references to payments to Paul Pumpian (during the testimony of undercover Agents Mooney, Welch, and Widman).

Although Wertheimer was not charged with the Pumpian issue, the Court allowed some limited testimony at that time, instructing the jury that Defendant is not charged with any wrongdoing with Mr. Pumpian. Furthermore, Agent Mooney testified about Henry Rameriz wanting a $2,500.00 retainer to make con-

[1]. The references to Biaggi, a Congressman whose trial and conviction received a great deal of notoriety, see United States v. Biaggi, 853 F.2d 85 (2nd Cir. 1988), were highly prejudicial. Wertheimer was not a defendant or unindicted coconspirator in that case.

tact with Bobby Salvidar at the V.A. Forman also testified about payments made by him to Lee Lamar arising out of the Defense Personnel Supply Center scandal in 1976 or 1977. Furthermore, Forman testified about payments he made to an individual named John Tracy at the SBA office in New York, who was introduced to him by Defendant Wertheimer. In fact, he testified that Wertheimer said he stayed in close touch with John Tracy and that he shared his income with Tracy. Agent Widman testified about Lawson's conversations with Pumpian, and his payment to Pumpian of $5,000.00 on July 5, 1990, at the same time that he paid $5,000.00 to Lawson. Agent Widman was also permitted to testify to a telephone conversation between Lawson and Wertheimer on July 12, 1990, when Wertheimer was no longer employed by Moran, and therefore not made during the course of the charged conspiracy. Also, Mr. Denniston of the V.A., who formerly worked at SBA, was permitted to testify about a lunch in October of 1990 with Gerald Lawson, at which Wertheimer was not present, and he was permitted to testify about Lawson permitting Pumpian to replace him at staff meetings with Denniston, again after the termination of the conspiracy. Agent Mooney and Wallace Forman both testified that Wertheimer talked about "buying a new hat," which they said referred to paying bribes. Also, Mooney testified that Wertheimer told him that he once took a suitcase of money to a hotel, met with a congressional staffer, and solved a problem for Forman.

During the course of Forman's testimony, counsel requested a limiting instruction under 404(b). The Court did not actually deliver that instruction until long after Forman had finished his testimony, Agent Welch had testified and there was a break in Agent Widman's testimony at the end of the day. At that time, the Court instructed the jury that there had been testimony which had nothing directly to do with anything with which the Defendant is charged, and instructed the jury further that such testimony was admitted for a limited purpose, "to the extent it gives

dercover agents as to what they were told by Appellant. There was no evidence presented, independent of statements by Wertheimer, to prove by any known standard of proof that Appellant actually performed the acts of which he allegedly spoke.

The 12 Circuits vary in articulating the standard of review of evidence admitted for purposes of proving extrinsic acts. Several Circuits say that the jury needs sufficient evidence to find that the Defendant actually committed the alleged extrinsic act. United States v. Ingraham, 832 F.2d 229, 235 (1st Cir. 1987); United States v. Garcia, 983 F.2d 1160, 1173 (1st Cir. 1993); United States v. Concepcion, 983 F.2d 369, 392-393 (2nd Cir. 1993); United States v. McGlory, 968 F.2d 309, 339 (3rd Cir. 1992); United States v. Gonzalez-Lira, 936 F.2d 184, 1989-90 (5th Cir. 1991); United States v. Mortuzavi, 702 F.2d 526, 528 (5th Cir. 1983); United States v. Patterson, 20 F.2d 3rd 809, 813 (10th Cir. 1994); United States v. Self, 2 F.2d 1071, 1088 (10th Cir. 1993); United States v. Stubbs, 944 F.2d 826, 836 (11th Cir. 1991).

Others require findings beyond a preponderance of the evidence. United States v. Langford, 990 F.2d 65, 70 (2nd Cir. 1993); United States v. Ebens, 800 F.2d 1422, 1432 (6th Cir. 1986); United States v. Brown, 948 F.2d 1076 (8th Cir. 1991); United States v. Nahoom, 791 F.2d 841, 845 (11th Cir. 1986).

The use of prior bad acts evidence must be examined meticulously in each case. United States v. Hernandez, 975 F.2d 1035, 1040 (4th Cir. 1992), and must be deemed reliable by the Judge prior to its admission. United States v. Benvenuti, 14 F.d 3rd 597 (4th Cir. 1994); United States v. Mallard, 16 F.d 3rd 1413 (4th Cir. 1994).

The evidence of prior acts "must be clear and convincing". United States v. Dolliale, 597 F.2d 102 (7th Cir.), cert. denied, 442 U.S. 946 (1979); United States v. Liefer, 778 F.2d 1236 (7th Cir. 1985); United States v. Estabrook, 774 F.2d 284, 288 (8th Cir. 1985); United States v. Bailleaux, 685 F.2d 1105, 1109-10

(9th Cir. 1982); United States v. Shelton, 628 F.2d 54, 56 (D.C. Cir. 1980).

This Court summarized four guidelines for admission of extrinsic evidence under 404(B), in Huddleston v. United States, 485 U.S. 681, 691-692 (1988):

1. The evidence must have a proper purpose under Rule 404(B);

2. It must be relevant under Rule 402;

3. Its probative value must outweigh its prejudicial effect under Rule 403; and

4. The Court must charge the jury to consider the evidence only for the limited purpose for which it is admitted.

The Third Circuit, in United States v. Sampson, 980 F.2d 883 (3rd Cir. 1992), added the requirement that the trial court must clearly articulate how the prior offense evidence fits into a chain of likely inferences, no link of which can be the inference that because the defendant committed prior similar offenses, he therefore is more likely to have committed this one. The Court required that the District Court, in the first instance, rather than the Appellate Court in retrospect, must articulate reasons on the record why the evidence also goes to show something other than character. Also see Government of Virgin Islands v. Archibald, 987 F.2d 180 (3rd Cir. 1993).

However, no matter how the courts articulate the Rule the basic premise is that there must be some degree of proof that the act occurred and that the defendant was the actor. As stated in Huddleston v. United States, supra, 485 U.S. at 689:

> "In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor. See United States v. Beechum, 582 F.2d 898, 912-913 (CA5, 1978) (en banc). In the instant case, the evidence that petitioner was selling the televisions was relevant under the government's theory only if the jury could reasonably find that the televisions were stolen."

insight on the intent of the defendant's actions either of mistake or perhaps showing some plan or design or method of operation. But that is the sole purpose of which it was admitted and you should limit that in your thinking." Then, when he charged the jury at the close of the case, the Court instructed that the Defendant is on trial only for the crime charged in the indictment and not for any other activities. He told the jury that although they had heard evidence of other acts by Defendant, the jury may consider that evidence "only as it bears on the Defendant's intent or state of mind or manner of operation, modus operandi or the plan, whatever, that has been charged in this case, and for no other purpose." He went on to elaborate:

> "And to elaborate more on the other acts of the defendant, the Government has offered evidence tending to show that on prior occasions the defendant engaged in conduct similar to the charges in the indictment. This evidence concerned the defendant's actions while in the employ of Wallace Forman.
>
> "In that connection, let me remind you that the defendant is not on trial for committing these acts. I say that again with full force and effect, he is not on trial for committing those acts. Accordingly, you may not consider this evidence of the similar acts as a substitute for proof that the defendant committed the crimes here charged.
>
> "Nor may you consider this evidence of proof that the defendant has a criminal personality of some sort or bad character. The evidence of the other similar acts was admitted for the much more limited purpose of proving the defendant's alleged knowledge and intent, and you may consider it only for that limited purpose.
>
> "If you determine that the defendant committed the acts

> charged in the indictment and the similar acts as well, then you may, but you need not, draw an inference that in doing the acts charged in the indictment, the defendant acted knowingly and intentionally and not because of some mistake, accident or other innocent reason.
>
> "Evidence of similar acts may not be considered by you for any other purpose. Specifically you may not use this evidence to conclude that because the defendant committed the other acts, he must also have committed the acts charged in this indictment."

Federal Rule of Evidence 404(b) (set forth in full at p.5, supra), provides that evidence of other crimes, wrongs or other acts is not admissible to prove the character of the person, but may be admissible as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In the case at bar, the trial Judge allowed the evidence of Wertheimer's prior payments of illegal gratuities to Lawson and another S.B.A. official (unnamed) to prove that Defendant acted knowingly and intentionally, and not by accident or mistake in this case. The Court noted it will also demonstrate plan, design and scheme because it shows Wertheimer's prior corrupt relationship with Lawson and Lawson's involvement in the corrupt activities and willingness to involve him insuch illegal activities. App. C, p.A18-19, infra.

The Appellate Court concluded that the District Court was well within its discussion in judging that the probative value of the evidence exceeded its potential for prejudice, because it was probative of a common plan, design or scheme employed by Wertheimer. App. A, p.A8, infra. However, as the Government admitted in its Brief in the Third Circuit, the primary testimony or evidence presented at trial regarding alleged other acts by Wertheimer, came from the testimony of Mr. Forman or the un-

> Huddleston v. United States, 485 U.S. 681, 689 (1988) (emphasis supplied)

Accord, United States v. Dowling, 855 F.2d 114 (3rd Cir. 1988). In the case of United States v. Beechum, 582 F.2d 898 (5th Cir. 1978), cited with approval by the Supreme Court in Huddleston, supra, the Fifth Circuit held:

> "Obviously, the line of reasoning that deems an extrinsic offense relevant to the issue of intent is valid only if an offense was in fact committed and the defendant in fact committed it. Therefore, as a predicate to a determination that the extrinsic offense is relevant, the Government must offer proof demonstrating that the defendant committed the offense. If the proof is insufficient, the judge must exclude the evidence because it is irrelevant."
>
> Id., at 912-913 (emphasis supplied).

It is settled federal law that proof of the commission of a criminal act must be based on proof other than the uncorroborated admission of the defendant. In Wong Sun v. United States, 371 U.S. 471 (1963), this Court held:

> "It is a settled principle of the administration of criminal justice in the federal courts that a conviction must rest upon firmer ground than an uncorroborated admission or confession of the accused. [footnote omitted]"
>
> Id., at 488.

In illustrating how this settled principle of corroboration is to be applied, this Court stated:

> "Where the crime involves physical damage to person or property, the prosecution must generally show that the injury for which the accused confesses responsibility did in fact occur, and that some person was criminally culpable.

> A notable example is the principle that an admission of homicide must be corroborated by tangible evidence of the death of the supposed victim. See 7 Wigmore, Evidence (3d ed. 1940), §2072, n.5. There need in such a case be no link, outside the confession, between the injury and the accused who admits having inflicted it. But where the crime involves no tangible corpus delicti, we have said that "the corroborative evidence must implicate the accused in order to show that a crime has been committed." [Smith v. United States] 348 U.S. [147], at 154. Finally, we have said that one uncorroborated admission by the accused does not, standing alone, corroborate an unverified confession. United States v. Calderon, 348 U.S. 160, 165, 99 L.ed 202, 208, 75 S.Ct. 186."
>
> Id., at 490 n.15.

The Eighth Circuit, in considering the role of an extrajudicial admission to establish intent, has stated:

> "However, if the proof of the essential element of intent to defraud or deceive depends entirely on an extrajudicial admission of the defendant made after the transaction alleged to be criminal, there must be independent evidence corroborating the essential admission. The reason for this rule is that the government will not be permitted to prove an essential element of the crime (or the corpus delicti) solely by an extrajudicial admission of the defendant made after the commission of the alleged crime, unless the admission is corroborated by substantial independent evidence."
> Gay v. United States, 408 F.2d 923, 929-930 (8th Cir. 1969).

See also United States v. Delay, 500 F.2d 1361 (8th Cir 1974). And see Note, Proof of the Corpus Delicti Aliunde the Defendant's Confession, 103 U. of Pa. L.Rev. 638 (1955).

The thrust of the cited cases is that the Government must

prove the existence of criminality independent of any admission of the defendant. Such was not done in the case at bar. The principal evidence of prior bad acts by Appellant was his alleged admissions after the prior acts had allegedly occurred and without any corroboration for their occurrence. What Appellant may have said about his conduct does not establish that he engaged in such conduct. For all that the Government was able to show, Appellant may have made the statements as a way of boosting his own fees, without ever approaching any S.B.A. official at any time.

The Court of Appeals in the instant case did not address the question of whether there was any proof of these alleged prior acts apart from hearsay statements and alleged admissions by Mr. Wertheimer. The Third Circuit, in footnote 3, pp.A8-A9, infra, concluded that improper evidence was either stricken or cured by a jury instruction, and that other evidence was properly admitted pursuant to Federal Rule of Evidence 801(d)(2)(E). However, the Court made no reference to the fact that both the existence of a conspiracy and the defendant's involvement in such conspiracy must be proved by a preponderance of the evidence. Bourjaily v. United States, 483 U.S. 171, 175-76 (1987). Furthermore, co-conspirator statements are admissible under that Rule if the Govenrmetn proves by a preponderance of competent evidence that the conspiracy existed, that the defendant and the declarant were members of the same conspiracy, and that the statements were made during the course of and in furtherance of the conspiracy. United States v. Van Daal Wyk, 840 F.2d 494, 496 (7th Cir. 1988). Also see United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977). Even the admission of a co-conspirator in the other crime is not sufficient proof of the other crime. United States v. Lyles, 593 F.2d 182 (2nd Cir.), cert. denied, 440 U.S. 972, 975 (1979).

Accordingly, the admission of the statements as to alleged prior uncharged crimes violated the decisions of this Court and

other Circuits interpreting Rule 404(B).

CONCLUSION

For all of the foregoing reasons, this Petition for Writ of Certiorari should be granted to permit this Court to clarify the conflicting decisions of the Circuits relating to the interpretation and application of 18 U.S.C. §201(c)(1)(b), and to clarify the conflicting decisions of the Circuits in interpreting and applying Federal Rule of Evidence 404(B).

Respectfully submitted,

Stanford Shmukler,
Counsel for Petitioner

NOT FOR PUBLICATION

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1315

UNITED STATES OF AMERICA
vs.
JULES WERTHEIMER,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D.C. Crim. No. 93-cr-00118)
District Judge: Honorable Robert S. Gawthrop, III

Submitted Under Third Circuit LAR 34.1 (a)
August 8, 1994
Before: MANSMANN, COWEN and MCKEE,
Circuit Judges.
(Filed Aug. 10, 1994)

MEMORANDUM OPINION OF THE COURT

MANSMANN, Circuit Judge.

Jules Wertheimer was indicted by a federal grand jury in the Eastern District of Pennsylvania on March 9, 1993, in a six count indictment charging him with (1) one count of conspiracy to un-

lawfully solicit and accept payment of illegal gratuities, in violation of 18 U.S.C. § 371 and to engage in a scheme to defraud the United States of the honest services of a Small Business Administration official, (2) two counts of devising and intending to devise the scheme of defrauding the United States through interstate wire communications, in violation of 18 U.S.C. § 1343, and (3) three counts of aiding and abetting the receipt of a thing of value by a public official for and because of acts performed and to be performed by that public official, in violation of 18 U.S.C. § 201(c) (1) (B) and § 2. On September 20, 1993, Wertheimer was convicted of all charges except one count of wire fraud, and on February 28, 1994, he was sentenced to 13 months' imprisonment, followed by supervised release for 36 months and fined $15,000 with assessments of $250. Wertheimer, through new counsel, appeals the denial of his motion for judgment of acquittal as well as the district court's instructions to the jury on the elements of conspiracy and entrapment. Wertheimer's new counsel also argues that Wertheimer was denied his right to effective counsel at trial and thus is entitled to have the conviction reversed on all counts, or alternatively, he is entitled to a new trial.[1]

I.

Jules Wertheimer was a consultant suspected by the FBI of procuring bribes for officials at the Small Business Administration. His prosecution was the fruit of a Federal Bureau of Investigation undercover sting operation, which was initiated to identify corrupt federal officials, government contractors and consultants involved in procurement. The FBI targeted Wertheimer on information from Wallace Forman, a Department of Defense

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1. This appeal is from a final judgment of sentence following a jury verdict, pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. The district court had jurisdiction pursuant to 18 U.S.C. § 3231.

contractor,[2] that Wertheimer had a history of paying bribes to government officials, at least on behalf of Forman's company. As part of the sting operation, the government set up an undercover consulting firm with the name Northeast Investors, Inc., which ostensibly was interested in marketing a textile product to the federal government.

In December of 1988, Forman introduced Wertheimer to the FBI agents posing as Northeast Investors' representatives. Special Agents Kevin Mooney (cover name Moran) and Maurice Welch (cover name Pearson) met with Wertheimer to discuss the possibility of hiring him as a consultant to aid them in obtaining government contracts to market their product. Later in the course of the sting operation, undercover agent Thomas Widman (cover name Wilcox) replaced Mooney. From the initial encounter, Wertheimer characterized himself to them as someone well connected with government contacts, referred to bribes he had paid in the past and insinuated that he could structure an SBA loan in such a way as to insulate everyone from prosecution.

In May of 1989, Mooney and Welch hired Wertheimer for a fee of $1,250 per week for 26 weeks and a $5,000 retainer. Wertheimer introduced Mooney and Welch to Gerald Lawson, an official with the SBA in Washington, D.C., and a long-standing associate of Wertheimer. Commencing with a first meeting between Mooney, Wertheimer and Lawson in Washington, D.C., on May 30, 1989, federal agents, Wertheimer, Forman and Lawson engaged in numerous meetings and conversations, many of which were recorded, either consensually or through court authorized wire taps. During these meetings, Lawson offered advice on how to market the textile business to the government, how to structure their corporation, how to secure a grant, and also indicated that he could introduce them to different government agency officials who could authorize purchase of their product. At trial the

2. Forman was cooperating with the federal government as part of a pre-indictment plea agreement.

government introduced evidence of these conversations to show that Wertheimer was encouraging the agents to "keep Lawson happy," meaning that Lawson expected bribe money.

As part of his strategy for insulating himself and others against conviction, Wertheimer was never actually present when the agents made payments to Lawson, but the agents testified that three payments of $5,000 each were paid to Lawson at Wertheimer's prompting. On many occasions Wertheimer indicated that he was aware when payments had been made and the times when Lawson would be anticipating further payments.

II.

A.

Wertheimer argues first that his aiding and abetting the receipt and acceptance of illegal payments to Lawson does not implicate 18 U.S.C. § 201(c) (1) (B) because Lawson had no authority to perform the functions for which he was paid, and hence his conduct did not fall within the ambit of the term "official act" for purposes of the statute.

Section 201(c) (1) (B) provides in pertinent part:

> (c) Whoever —
>
> (1) otherwise than as provided by law for the proper discharge of official duty —
>
> (B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;. . .
>
> shall be fined under this title or imprisoned for not more than two years, or both.

The term "official act" is defined by 18 U.S.C. § 201(a) (3) as:

> . . .any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

Wertheimer's interpretation of the term "official act" as meaning only an act by which the official is authorized to bind his office does not comport with our jurisprudence and that of our sister courts of appeals. We have held that liability under § 201(c) (1) attaches where the public official solicits a bribe in exchange for the violation of an official duty or for being unduly influenced in the performance of any official act, even where the public official's advice and recommendation would be influential but not binding with regard to the final outcome. United States v. Heffler, 402 F.2d 924, 926 (3d Cir. 1968), cert. denied, 394 U.S. 946 (1969). See also United States v. Evans, 572 F.2d 455, 479-81 (5th Cir.), cert. denied, 439 U.S. 870 (1978) (an "official act" may be found under the unlawful gratuity statute even where the official's position is ministerial or subordinate and the official lacks the authority to perform an act beneficial to the donor); United States v.Biaggi, 853 F.2d 89, 97 (2d Cir. 1988), cert. denied, 489 U.S. 1052 (1989) ("official acts" within § 201 is interpreted sufficiently broadly to encompass all acts normally within the scope of the legitimate use of the office); United States v.Birdsall, 233 U.S. 223, 231 (1914) ("official acts" are not limited to those acts proscribed by statute, written rule or regulation, but extend to the established usage of the office). Cf. United States v. Muntain, 610 F.2d 964, 967-70 (D.C. Cir. 1979) ("official act" not found where payment received by the official was for services having nothing to do with the government office or with any responsibility the official had as U.S. employee, despite fact that defendant used his official position to promote his purely private venture).

The fact that Lawson had no authority to commit the Office

of Advocacy of the SBA to any official act does not in itself insulate Wertheimer from § 201 liability. Lawson's official duties included offering advice to small businesses on how to comply with government regulations in order to qualify for government contracts. His acts of advising the undercover directors of Northeast Investors on how to qualify as a small business for government contracts was certainly within the scope of his duties at the SBA, and his attempt to provide them with an unfair advantage through the misuse of his influence as a public official certainly falls within the scope of § 201. The government clearly established that Lawson, aided and abetted by Wertheimer, solicited and accepted illegal bribes for actions which he performed or promised to perform within the scope of his official capacity; therefore, Lawson's acts fall within the ambit of "official acts" under the statute pursuant to which Wertheimer was charged as an aider and abettor.

B.

Prior to commencement of trial, the district court entered an order granting the government's motion to admit evidence of uncharged crimes pursuant to Federal Rule of Evidence 404 (b) showing that Wertheimer had a history of paying illegal gratuities, in particular to Lawson and another SBA official on behalf of Forman. Wertheimer asserts that the district court failed to make the required findings under United States v.Sampson, 980 F.2d 883 (3d Cir. 1992), and Huddleston v. United States, 485 U.S. 681 (1988), before admitting Rule 404 (b) material. Wertheimer further argues that the limiting instructions to the jury were insufficient to overcome the potential inference from evidence that Wertheimer committed prior offenses that he was more likely to have committed the one for which he was being tried.

In Huddleston, the Supreme Court held that protection against unfair prejudice from material introduced under Rule 404 (b) emanates from four sources:

> first, from the requirement of Rule 404 (b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402 — as enforced through Rule 104 (b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice . . .; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.

485 U.S. at 691-92.

Similarly, in Sampson we held that:

> The trial court must consider two issues when deciding whether to admit prior convictions. first, whether the conviction is logically relevant under Rules 404 (b) and 402 to any issue other than the defendant's propensity to commit the crime; second, if relevant, whether under Rule 403 the probative value of the evidence outweighs its prejudicial effect. The trial court has "considerable leeway" in both the Rule 404 (b) relevancy determination and the balancing test under Rule 403.

980 F.2d at 886 (citations omitted.) We further noted in Sampson that Rule 404 (b) is inclusive, emphasizing admissibility. Id. (citing Government of Virgin Islands v. Edwards, 903 F.2d 267, 270 (3d Cir. 1990) (citing United States v. Scarfo, 850 F.2d 1015, 1019 (3d Cir. 1988)). Thus, evidence of similar acts bearing upon the defendant's character or the defendant's propensity to commit the presently charged crime is excluded, but where such evidence tends to prove some other fact, it is admitted if its proba-

tive value outweighs its prejudicial effect. Sampson, 980 F.2d at 887.

The evidence offered by the government in its motion supported the issue of whether Wertheimer acted knowingly and intentionally with regard to the acts connected to the sting operation. The evidence was highly probative of a common plan, design or scheme employed by Wertheimer in payment of illegal gratuities to government officials. Thus, the evidence was highly relevant and was offered for a proper purpose. The district court was well within its discretion in judging that the probative value of the evidence exceeded its potential for prejudice. Furthermore, the district court explicitly and extensively instructed the jury to consider the evidence only for the limited purposes for which it was admitted. See A. 396-97; A. 520; A. 522-23. In its instructions to the jury, the district court clearly met its burden to "articulate reasons why the evidence also goes to show something other than character," and to "put a chain of inferences into the record, none of which is the inference that the defendant has a propensity to commit this crime." Sampson, 980 F.2d at 888 .[3]

C.

During jury deliberation, the jury asked the court whether the FBI agents could be considered part of the conspiracy. The district court responded:

> The answer to that question is no. Gerald Lawson is the alleged co-conspirator. He is the only one who is alleged so to be.

A. 593 (emphasis added).

The district court had earlier instructed the jury that:

> The conspirator performing the overt act need not be the defendant who is before you in this case. An overt act is any

3. Wertheimer asserts that even if the evidence admitted met the Sampson requirements, it went far beyond the district

(continued...)

act knowingly committed by one of the conspirators during the existence of the conspiracy in an effort to accomplish the object or purpose of the conspiracy.

A. 537 (emphasis added).

Wertheimer argues that the district court failed to state that Forman could not be considered to be a conspirator, and further failed to instruct the jury that no acts or statements of the FBI agents or of Forman could be considered as overt acts attributed to Wertheimer as a co-conspirator.

We find that the court's instruction that Lawson was the only co-conspirator, taken in the context of the court's instructions regarding the requirements of an overt act, clearly alerted the jury to the fact that neither the actions of the FBI agents nor of Forman could be considered overt acts in furtherance of the conspiracy. We are satisfied that the jury verdict does not reflect any mistaken belief that the FBI agents and Forman were co-conspirators and that one of their acts was the underlying overt act upon which Wertheimer's conviction was based.

Wertheimer further maintains that the district court's instructions on entrapment were inadequate and therefore deprived him of a fair trial. Again, taken in their totality, the district court's instructions on entrapment fairly and adequately described the defense to the jury. Wertheimer's contention is without merit. See A. 553-57; 570-74.

Finally, Wertheimer claims that his defense counsel's failure to submit a point for charge on whether the FBI agents and Forman were co-conspirators, his failure to object to the charge given on membership in the conspiracy, and his failure to object

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3. (...continued)
court's order. We find that the district court did not err in this regard. Any improper evidence was either stricken, (A. 62), or was cured by a jury instruction, (A. 107). Other evidence was properly admitted pursuant to Federal Rule of Evidence 801(d) (2) (E).

to the charge on entrapment deprived Wertheimer of a fair trial. Wertheimer insists that he would not have been convicted but for ineffective assistance of counsel. As already stated, we find that the district court's jury instructions were adequate on the elements and issues pertaining to conspiracy as well as to entrapment; hence, defense counsel's alleged omissions did not render his advocacy below a reasonable standard of competence. Because the record establishes that Wertheimer's ineffective assistance of counsel claim lacks merit, we will reject this claim on direct appeal.

III.

Based on the foregoing the judgment of conviction and sentence of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 2:93CR00118-1

H. ELLIOT WALES
Defendant's Attorney

UNITED STATES OF AMERICA
V.
JULES WERTHEIMER
(Name of Defendant)

THE DEFENDANT:
[ ] pleaded guilty to count(s)
[ ] pleaded nolo contendere to count(s)
which (was) (were) accepted by the court.
[X] was found guilty on count(s) 1, 2, 4, 5, and 6
after a plea of not guilty.

Title/Sect	Nature of Offense	Date Offense Concluded	Count Number(s)
18 USC §371	Conspiracy	09/09/92	1
18 USC §1343	Wire Fraud	09/09/92	2
18 USC §201(c) (1) (B)	Receipt of unlawful gratuities	09/09/92	4
18 USC §201(c) (1) (B)	Receipt of unlawful gratuities	09/09/92	5
18 USC §201(c) (1) (B)	Receipt of unlawful gratuities	09/09/92	6

The defendant is sentenced as provided in pages 1 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) 3
and is discharged as to such count(s).
[ ] Count(s)_____ (is)(are) dismissed on the motion of the

United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, resident, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 099-24-3427
Defendant's Date of Birth: 06/01/28

02/28/94
Date of Imposition of Judgment

Defendant's Mailing Address:

1520 YORK AVENUE

NEW YORK NY 10028

Signature of Judicial Officer

ROBERT S. GAWTHROP, III
JUDGE USDC EDPA
Name & Title of Judicial Officer

Defendant's Residence Address:

1520 YORK AVENUE

NEW YORK NY 10028

Date

DEFENDANT: JULES WERTHEIMER
CASE NUMBER: 2:93CR00118 -1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 13 months.

13 months on Count(s):1, 2, 4, 5 and 6 - CONCURRENTLY

[X] The court makes the following recommendations to the Bureau of Prisons:

[X] The defendant shall surrender for service of sentence at the institution designated by the Buereau of Prison

[X] before 2:00 p.m. on 03/31/94.
[ ] As notified by the United States Marshal.
[ ] As notified by the probation office.

DEFENDANT: JULES WERTHEIMER
CASE NUMBER: 2:93CR00118 - 1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 36 months.

36 months as to Count(s): 1 and 2
12 months as to Count(s): 4, 5 and 6

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons. While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall not possess a firearm or destructive device. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the schedule of payments set forth in the financial obligation portion of this Judgment. The defendant shall comply with the following additional conditions:

All terms of supervised release shall run CONCURRENTLY.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer, unless the defendant is in compliance with the installment payment schedule.

The defendant shall provide the probation officer with access to any requested financial information.

The defendant shall pay a fine in the amount of $15,000.00 as directed by the probation officer.

STANDARD CONDITION OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling,training, or other acceptable reasons;
6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or else where and shall permit confiscation of any contraband observed in plain view of the proba-

tion officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notifica tion requirement.

DEFENDANT: JULES WERTHEIMER
CASE NUMBER: 2:93CR00118 - 1

FINANCIAL OBLIGATIONS

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set out below:

Count		Assessment		Fine		Restitution
1	$	50.00	$	15,000.00	$	.00
2	$	50.00	$	.00	$	.00
4	$	50.00	$	.00	$	.00
5	$	50.00	$	.00	$	.00
6	$	50.00	$	.00	$	.00
Totals:	$	250.00	$	15,000.00	$	.00

FINE

The total fine and other monetary penalities shall be paid as follows:

[X] in full immediately.

[ ] in full not later than _____.

[X] in installments which the probation officer shall establish and may periodically modify provided that the entire financial penalty is paid no later than 5 years after release from incarceration, if incarceration is imposed. If probation is imposed, not later than the expiration of probation.

[ ] in monthly installments of $_____ over a period of _____ months. The probation officer may periodically modify the payment schedule, provided the penalty is paid in full in accordance with the term specified above. The first payment is due 30 days after the date of this judgment. The second and subsequent payments are due monthly thereafter.

All financial penalty payments are to be made to U.S. Clerk of Court Eastern District of Pennsylvania except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. §3612(f). All of the above payment options are subject to penalities for default and delinquency pursuant to 18 U.S.C. §3612(g).

Unless otherwise ordered by the court, any financial penalty imposed by this order shall be due and payable during the period of incarceration, with any unpaid balance to be a condition of supervised release. Any financial penalties collected while the defendant is incarcerated shall be reported by the Bureau of Prisons to the Clerk of the Court and the probation officer. The probation officer shall notify the United States District Court, the Clerk of the Court, and the United States Attorney's Office of the payment schedule and any modifications to that schedule.

DEFENDANT: JULES WERTHEIMER
CASE NUMBER: 2:93CR00118 - 1

STATEMENT OF REASONS

[X] The Court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The Court adopts the factual findings and guideline application in the presentence report except

Guideline Range Determined by the Court:

Total Offense Level: 12

Criminal History Category: I

Imprisonment Range: 10 to 16 months and ____ months consecutive.

Supervised Release Range: 2 to 3 years

Fine Range: $ 3,000.00 to $ 30,000.00

[ ] Fine waived or imposed below the guideline range, because of inability to pay.

Restitution: $_____

[ ] Full restitution is not ordered for the following reasons(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
FILED SEPT. 13, 1993
v.
Criminal No.. 93-118-01

UNITED STATES OF AMERICA
v.
JULES WERTHEIMER

Order

AND NOW, this 7th day of September, 1993, it is hereby

ORDERED

that the government's Motion to Admit Evidence of Similar Acts is hereby granted. In support of this ruling the Court makes the following findings of fact:

1. Evidence of defendant Jules Wertheimer's prior payments of illegal gratuities to SBA official Gerald Lawson, now deceased, and another SBA official is admissible to prove that on the occasions in question in this case, the defendant acted knowingly and intentionally, and not by accident or mistake. It will also demonstrate plan, design and scheme.

2. The evidence of Wertheimer's prior payments of illegal gratuities to Lawson and another SBA official is probative of Wertheimer's knowledge and intent because it shows that he had a prior corrupt relationship with Lawson, that he understands how illegal gratuities and bribes are paid to government officials and

the need for secrecy in such relationships, and that he is aware of Gerald Lawson's involvement in corrupt activities, as well as Lawson's willingness to involve him in such illegal activities.

3. For the same reasons, it is probative of Wertheimer's plan, design and scheme used in this case.

BY THE COURT:

The Honorable Robert S. Gawthrop, III
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
v.
CRIMINAL ACTION NO. 93-118-01
JULES WERTHEIMER

ORDER

AND NOW, this 8th day of November, 1993, Defendant's Motion for Judgment of Acquittal on Counts One, Four, Five, and Six is DENIED.*

BY THE COURT:

Robert S. Gawthrop, III,

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* Defendant moves for judgment of acquittal as to the above counts on the grounds that the government failed to prove that deceased co-defendant Gerald Lawson received monies because of an "official act" performed or to be performed by him. Defendant contends that as a middle-level employee of the Small Business Administration with no decision-making authority, Mr. Lawson would dispense advise, but could not perform an official act.

If I were to accept Defendant's definition of what constitutes an official act, then virtually nothing that Mr. Lawson, or for that matter any middle-level government employee who does not have decision-making power, could be characterisable as an official act, and middle level government employees could accept bribes with near impunity.

To take on the cast of an "official act" it was not necessary that Mr. Lawson's actions be directed at a specific, achievable goal. United States v. Niederberger, 580 F.2d 63 (1978). Indeed so long as his actions were taken in the course of performance of his job, which the evidence and the testimony at trial show they were, they were official. United States v. Birdshall, 233 U.S. 223, 231 (1914).